THE DE FACTO DOCTRINE. — Although it is well settled that the acts of *de facto* officers are valid from the point of view of third persons,[1] there is a diversity of opinion as to whether officers appointed by *de facto* officers become *de jure* officers. The early English courts, because of the technical common-law notion of a public office,[2] repeatedly held that one claiming to be seised of a public office must show a sound legal right.[3] A *de facto* election could not be a link in the title of a *de jure* officer.[4] But the American courts, regarding an office more as a contract [5] of employment, argue that, as such *de facto* officers can make binding contracts and pass valid titles, they can also pass incontestible titles to those that they elect.[6] New York, however, follows the former [7] English view.[8] A recent case set aside the election of new directors by the *de facto* directors of a private [9] corporation.[10] *Matter of Ringler & Co.*, 204 N. Y. 30.

The New York court justifies its decision by criticizing the *de facto* doctrine as a whole. It seems to the court to be "one of those legal makeshifts by which unlawful or irregular corporate and public acts are legalized," [11] and a principle to be confined within narrow limits. On such a view the officious person is not an officer at all, but in certain cases the court, on principles analogous to estoppel, will work justice between third parties by refusing to permit his title to be questioned. But does

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[1] Margate Co. *v.* Hannam, 3 B. & Ald. 266. See 20 HARV. L. REV. 456 *et seq.*; CONSTANTINEAU, DE FACTO DOCTRINE, § 3 *et seq.*

[2] See 24 HARV. L. REV. 658.

[3] King *v.* Lisle, Andr. 163.

[4] "If you derive title to a corporate office through A., and the prosecutor shew a judgment of *ouster* against A., it is conclusive against you. . . ." See King *v.* York, 5 T. R. 66, 72.

[5] A few states have allowed *de facto* officers to recover their salaries on the ground that they are servants of the people. Erwin *v.* Mayor, etc. of Jersey City, 60 N. J. L. 141, 37 Atl. 732. It also would seem that in America a public office is not property. See 14 HARV. L. REV. 218. But it is quite clear that an office is not such a contract of employment as to be within the constitutional prohibition against impairing the obligation of contract. Butler *v.* Pennsylvania, 10 How. (U. S.) 402.

[6] Attorney-General *ex rel.* Fuller *v.* Parsell, 99 Mich. 381, 58 N. W. 335; State *ex rel.* Mitchell *v.* Tolan, 33 N. J. L. 195. "Why is the defendant a *de facto* and not a *de jure* officer? When the defendant is asked: 'By what authority do you hold the office?' he answers, by the appointment of the Judge of the Superior Court. And when it is replied, but that Judge was only a Judge *de facto*; the defendant rejoins, that may be so; but all his necessary official acts are valid as to the public and third persons; my appointment was a necessary official act, and therefore, valid; . . ." See Norfleet *v.* Staton, 73 N. C. 546, 549.

[7] Since 1882, by Act of Parliament, elections conducted in England by *de facto* municipal officers cannot be questioned collaterally. MUNICIPAL CORPORATIONS ACT, 1882 (45 & 46 VICT. c. 50), §§ 42, 102. Canada has always adopted the American view. *In re* McPherson *v.* Beeman, 17 U. C. Q. B. (Can.) 99; Lacasse *v.* Roy, 8 Quebec Super. Ct. (Can.) 293.

[8] People *ex rel.* Steinert *v.* Anthony, 6 Hun (N. Y.) 142. "Without right himself, he cannot confer any on others." Mayor, etc. of New York *v.* Flagg, 6 Abb. Prac. (N. Y.) 296, 302.

[9] On this question no distinction is made even in the principal case between a public and a private office. See also 3 THOMPSON, CORPORATIONS, § 3893; 3 COOK, CORPORATIONS, § 713.

[10] Werner, J.: "It is in terms a paradox to say that one who owes his election or appointment to an unlawful usurpation of power by another, holds his appointment or election *de jure*." Matter of Ringler & Co., 204 N. Y. 30, 45.

[11] Matter of Ringler & Co., *supra*, 42.

such a theory satisfactorily explain the cases? It is well settled that if the office that the assumed officer purports to occupy was created by an unconstitutional statute, and hence does not exist in contemplation of law, all the acts of the assumed officer are open to collateral attack.[12] Again, the law is that if the assumed officer does not hold under "color of title" his acts are not valid even with regard to innocent third parties that have had no notice of his want of authority.[13] If, as the New York court contends, the *de facto* doctrine legalizes unlawful acts for the benefit of innocent third parties, here are two arbitrary limitations that bear no relation to the knowledge of the third parties. No reasons of fairness between the parties can justify such distinctions.

But the language of the majority of American courts seems to show that they have adopted a more liberal view of the *de facto* doctrine. However an office is defined,[14] all will agree that an officer is an individual to whose acts the law attaches special consequences because of the office that he occupies. Conversely it may be argued that when the law attaches similar consequences to the acts of another individual, it is also proper to call him an "officer." There are thus two kinds of officers, both in a primary sense "lawful," for both are recognized by law. The one kind, duly elected, have many rights, as well as powers and duties; the other kind, becoming officers by their own acts, acquire no rights themselves: no right to remain in office;[15] no right to salary;[16] and no right to do anything that a private individual cannot do.[17] But they do acquire the power to change the rights of others: the power to pass titles to others; the power to make contracts; and now generally the power to elect other officers. They acquire these powers because they have become officers by occupying the office. Hence if no office has been created because of the unconstitutionality of a statute they cannot acquire these powers. Neither can they become officers unless they occupy the office under "color of title" just as a disseisor of land must occupy under claim of right. "Color of title" thus distinguishes true officers, both *de jure* and *de facto*, from mere usurpers.

REMOVAL FOR PUBLIC HEALTH OF DAMS BY POLICE POWER OR EMINENT DOMAIN. — The taking of property by eminent domain for a public use is often almost indistinguishable[1] from such deprivations as are merely results of those regulations under the police power for the protection of public health, safety, or morals which are not burdened with a constitutional requirement of compensation.[2] This is especially true, since a

[12] Norton *v.* Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121.

[13] Norfleet *v.* Staton, *supra*.

[14] An office has been variously defined as a "right," a "charge," a "permanent trust," an "agency." See 2 BL. COMM. 36; United States *v.* Maurice, 2 Brock. (U. S.) 96, 102; Matter of Hathaway, 71 N. Y. 238; Chark *v.* Stanley, 66 N. C. 59.

[15] In *quo warranto* proceedings a judgment of *ouster* would be pronounced against a *de facto* officer. *In re* Delgardo, 140 U. S. 586, 11 Sup. Ct. 874.

[16] See 24 HARV. L. REV. 658.

[17] People *ex rel.* Sullivan *v.* Weber, 86 Ill. 283.

[1] See 25 HARV. L. REV. 389.

[2] Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. 273.